

SOUTHERN UTAH WILDERNESS ALLIANCE

IBLA 2000-213

Decided January 23, 2003

Appeal from a decision of the Field Manager, St. George, Utah, Field Office, authorizing the sale of mineral materials. UTU-78489.

Affirmed.

1. Environmental Quality: Environmental Statements--Materials Act--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact

When certain lands have been the subject of a BLM wilderness inventory and found not to be within a wilderness study area in a final decision, the fact a party disputes this finding and believes that BLM erred does not itself establish a mineral material sale on such land will have significant impact requiring preparation of an EIS.

2. Evidence: Generally--Evidence: Preponderance--Materials Act: Generally

A mere difference of opinion will not overcome the reasoned opinions of the Secretary's technical experts. Absent evidence which rebuts the basis of the findings, the Secretary was entitled to rely on a wildlife biologist's memorandum reporting that endangered milk-vetch species were not found on the mineral material sale site.

3. Environmental Quality: Environmental Statements-- Materials Act-- National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact

The National Environmental Policy Act requires BLM to consider a reasonable range of alternatives, including the no action alternative. Such alternatives should include reasonable alternatives to proposed action which will accomplish the intended

purpose, are technically and economically feasible, and yet have a lesser impact. No error is committed by not considering an alternative that would not achieve the purpose of the proposed action.

APPEARANCES: Liz Thomas, Esq., Cedar City, Utah, for appellant; David K. Grayson, Esq., Office of the Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Southern Utah Wilderness Alliance (SUWA) has appealed a March 20, 2000, decision record (DR) of the Field Manager, St. George Field Office, authorizing a mineral material sale (UTU-78489) for a rock quarry and crushing operation on Utah Hill near St. George, Utah. Mineral material sales for minerals which are neither leasable under the Mineral Leasing Act 1/ nor locatable under provisions of the Mining Law of 1872 2/ are authorized under the Material Sales Act of 1947, as amended, 30 U.S.C. §§ 601-604 (1994), and the implementing regulations at 43 CFR Part 3610. The BLM decision to authorize the sale was based in part on an environmental assessment (EA) for the mineral material sale (UT-045-00-EA-07) and a finding of no significant impact (FONSI) to the environment which would require preparation of an environmental impact statement (EIS).

The EA was developed in response to an application filed by Mark Carter of Carter Stone Works. The EA notes that the "Purpose and Need" for the proposed action is to open a source of decorative landscaping rock for use in Southwestern Utah. Reportedly, the rock possesses unusual color and sparkle and is very durable rendering it ideal for landscaping purposes. In the EA, BLM states that "currently there is no local source of rock or stone of this color and type in the St. George area." (EA at 1.)

In a previous Order dated June 7, 2000, addressing appellant's stay petition filed in this case, we reviewed appellant's contentions on appeal. Appellant argues that the EA violates the National Environmental Policy Act (NEPA), § 102(2)(C), 42 U.S.C. § 4332(2)(C) (2000), by failing to use the most current and accurate information. In particular, appellant contends that BLM erred in failing to conduct a current inventory of the wilderness characteristics of the land involved prior to approval, asserting that BLM improperly relied upon the wilderness inventory which it performed pursuant to section 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (2000), approximately 20 years ago. Appellant contends that section 201 of FLPMA, 43 U.S.C. § 1711 (2000), requires BLM to update and maintain a current inventory of the public lands. Specifically, appellant quotes language in section 201 of FLPMA Directing the Secretary to "prepare and maintain on a continuing basis an inventory of all public lands." 43 U.S.C. § 1711(a) (2000). Citing to a portion of the legislative history of FLPMA to support a matter that does

1/ 30 U.S.C. §§ 181-287 (1994).

2/ 30 U.S.C. §§ 22, 23, 28, 35 (1994).

not appear in the terms of the statute itself, appellant argues that Congress intended to require inventories be updated every 10 years.

Further, appellant argues that the prior BLM wilderness inventory was flawed and that BLM has conducted a re-inventory of a portion of the public lands in Utah, although the land at issue in this case was not included in the re-inventory. Appellant also contends that this land is part of a large area with potential for wilderness designation which has been identified in bills pending before Congress.

Additionally, appellant asserts that BLM violated NEPA by failing to consider an adequate range of alternatives in the EA. In particular, appellant contends BLM should have considered an alternative which would have required the quarry to be located in a different area in which the land has already been developed and no longer qualifies for wilderness. Appellant also contends that new information in the form of a request subsequent to the BLM decision by the U.S. Fish and Wildlife Service (FWS) for comments regarding potential endangered species status for the Holmgren milk-vetch and the Shivwits milk-vetch requires a supplemental EA to determine whether any population of these plant species would be affected by the quarry operation.

[1] In our prior Order, we addressed appellant's claim that BLM is required to do a new wilderness inventory prior to approving a mineral material sale contract. Rejecting appellant's claim, we quoted at page 2 of that Order from several Board decisions addressing this issue:

Appellants also argue that the EA violated NEPA in failing to consider any potential adverse impacts APD approval might have on the area's eligibility for designation as a wilderness area within the National Wilderness System. Specifically, appellants argue that approval of the APD allows development within a potential wilderness area, as proposed by Utah Congressman Wayne Owens, and that under such circumstances, NEPA requires preparation of an EIS.

First, NEPA does not contain directives which BLM must observe in evaluating the wilderness characteristics of an area. That evaluation was conducted pursuant to the relevant provisions of the Federal Land Policy and Management Act of 1976 and Wilderness Act. The Wilderness Society, 119 IBLA 168 (1991).

Second, as we have stated on a number of occasions, final administrative decisions relating to the designation of land as WSA's in Utah were completed in the 1980's. Southern Utah Wilderness Alliance, 123 IBLA 13, 18 (1992); Southern Utah Wilderness Alliance, 122 IBLA 17, 21 n.4 (1992). The lands in question were not included in a WSA. Therefore, BLM may administer them for other purposes, including the approval of drilling for oil and gas. Id.

Southern Utah Wilderness Alliance, 128 IBLA 52, 65-66 (1993) (footnote omitted); quoted in, Southern Utah Wilderness Alliance, 151 IBLA 338, 341-42 (2000); Southern Utah Wilderness Alliance, 150 IBLA 263, 266-67 (1999).

Appellant's claim that BLM has acknowledged that in some areas of Utah the original wilderness inventory was conducted by employees with limited experience and guidance is also unpersuasive. Any current appeal of that wilderness inventory must be dismissed as untimely. See Southern Utah Wilderness Association, 122 IBLA 17, 21 n.4 (1992). Thus, contrary to appellant's argument, we find that the issue of the adequacy of the BLM's Utah Statewide Wilderness EIS is not before us in this case. Rather, the issue raised by this appeal is the sufficiency of the EA to support the mineral materials sale. Accordingly, the fact that appellant disagrees with the BLM wilderness inventory and believes BLM should have found that this area qualifies as a WSA does not establish that the mineral material sale will have a significant impact requiring preparation of an EIS.

Regarding SUWA's argument concerning the Holmgren milk-vetch and the Shivwits milk-vetch as potential endangered species, the Board held in granting appellant's petition for stay on June 7, 2000:

With respect to the Holmgren milk-vetch [*Astragalus holmgreniorum*] and the Shivwits milk-vetch [*Astragalus ampullaroides*] which were the subject of the Federal Register notice, we note that the record discloses that a BLM wildlife biologist performed a survey of the site for threatened and endangered and candidate species on December 10, 1999, prior to the decision on appeal. No threatened or endangered or candidate species were found. The Federal Register notice seeking comments regarding the proposed rule which would designate the milk-vetch species as endangered was issued subsequent to the survey and these species would apparently not have been included in the survey. The Federal Register notice indicated that both species are found in the immediate vicinity of St. George, Utah. 65 FR 19728 (April 12, 2000). Under section 7 of the Endangered Species Act, BLM is required to consult with the U.S. Fish and Wildlife Service regarding any action which is likely to jeopardize the continued existence or adversely affect the critical habitat of species proposed for listing as threatened and endangered. 16 U.S.C. § 1536(a) (4) (1994). Accordingly, it is necessary to issue a stay pending a resurvey regarding the presence of the milk-vetch species and any appropriate consultation with U.S. Fish and Wildlife Service.

(June 7, 2000, Order at 3.)

In its Answer subsequently filed July 3, 2000, BLM reports that its expert biologist in the St. George Field Office has concluded that neither the Holmgren milk-vetch nor the Hermit milk-vetch, *Astragalus*

ampullarioides (same scientific name as Shivwits milk-vetch), occur in the vicinity of the proposed Utah Hill decorative stone pit. The BLM Answer quotes from a memorandum dated June 7, 2000, from Robert Douglas, Wildlife Biologist, to the Field Manager in the St. George Field Office. That memorandum states:

On December 10, 1999, a threatened, endangered and candidate species clearance was completed on the Carter Utah Hill Rock Site. At the time of the field work (December 6, 1999), a survey for Hermit milk-vetch (*Astragalus ampullarioides*), and Holmgren milk-vetch (*Astragalus holmgreniorum*) was completed. These plants were not found on the proposed rock site. The specialized soils in which these plants occur are not found in this general area. A copy of the original survey report is attached.

The stated purpose of the attached report was to field check for threatened, endangered and candidate species. The description of findings states "[n]o threatened, endangered or candidate species were found."

[2] The Secretary is entitled to rely upon her technical experts. Absent a showing of error by a preponderance of the evidence, a mere difference of opinion will not overcome the reasoned opinions of the Secretary's technical staff. Susan J. Doyle, 138 IBLA 324, 327-28 (1997); Bill Armstrong, 131 IBLA 349, 351 (2000); American Gilsonite, 111 IBLA 1, 30, 96 I.D. 408,424-25 (1989). The record on appeal contains no contrary information indicating that the above referenced milk vetch species exist on the mineral material site which is the subject of the sale. Appellant has not submitted a field survey or any other evidence contradicting the statement of BLM's biologist. Accordingly, appellant has not sustained the burden of showing further environmental analysis is required by the possible presence of these potentially endangered species.

Regarding appellant's assertion of a statutory obligation to conduct a re-inventory of the lands claimed by appellant to possess wilderness characteristics, BLM contends that decisions under section 201 of FLPMA addressing which lands to re-inventory and which resource values to include in the re-inventory are committed to the discretion of the Secretary of the Interior. Further, BLM argues the Board has no jurisdiction to review this exercise of discretion. It is also noted by BLM that under the express terms of section 201, the inventory does not itself change the use of the public lands. 3/

The manner and timing of implementation of the statutory mandate to keep a current inventory of the public lands and their resource values is committed to the discretion of the Secretary by section 201(a) of FLPMA. 43 U.S.C. § 1711(a). This authority has been delegated to BLM.

3/ Use of the public lands is governed in part by the relevant land use plan. Development and revision of land use plans are governed by sec. 202 of FLPMA, 43 U.S.C. § 1712 (2000).

This Board has no supervisory authority over BLM and, hence, we must deny appellant's request to order a re-inventory. See Coalition for High Rock/Black Rock Emigrant Trail National Conservation Area, 147 IBLA 92, 100 (1998). We thus find no basis in FLPMA for requiring BLM to conduct a new inventory of the wilderness potential of the land prior to this material sale. The adequacy of the EA to support the material sale decision is properly distinguished from an obligation to conduct a re-inventory.

[3] Appellant claims that BLM failed to consider a reasonable range of alternatives, in violation of section 102(2)(E) of NEPA, as amended, 42 U.S.C. § 4332(2)(E) (2000). We have held that BLM is required to consider a reasonable range of alternatives which includes the no-action alternative. Larry Thompson, 151 IBLA 208, 219 (1999); Southern Utah Wilderness Alliance, 122 IBLA 334, 339-40 (1992). Section 102(2)(E) requires BLM to consider "appropriate alternatives" to the proposed action as well as their environmental consequences. See 40 CFR 1501.2(c) and 1508.9(b); City of Aurora v. Hunt, 749 F.2d 1457, 1466 (10th Cir. 1984); Larry Thompson, 151 IBLA at 219. "Such alternatives should include reasonable alternatives to a proposed action, which will accomplish the intended purpose, are technically and economically feasible, and yet have a lesser impact. 40 CFR 1500.2(e)." Headwaters, Inc. v. BLM, 914 F.2d 1174, 1180-81 (9th Cir. 1990); City of Aurora v. BLM, 749 F.2d at 1466-67; Sierra Club Uncompahgre Group, 152 IBLA 371, 378-79 (2000); Defenders of Wildlife, 152 IBLA 1, 9 (2000); Larry Thompson, 151 IBLA at 219-20.

In evaluating alternatives in the EA, BLM considered the proposed action, the no-action alternative, and a modified approach which would require commencing quarrying at the top of the outcrop rather than at the base of the hillside. (EA at 6.) This latter alternative was eliminated from detailed analysis because it was not a feasible method of quarrying this vertical bedded deposit and because it would entail substantial surface disturbance in the form of road building which would become excessive in the event the market for the rock material did not justify mining the entire deposit. Id. While appellant charges BLM should have considered the alternative of relegating the quarry to an area of the public lands which does not possess wilderness potential, BLM contends that the deposit exposed at the site has unique characteristics involving color, sparkle, and durability which make it ideal for landscaping purposes. (BLM Answer at 2.) Further, BLM asserts that currently there is no local source of rock of this type in the area. Id.

In Sierra Club Uncompahgre Group, this Board upheld BLM's decision not to include a particular alternative because it would not advance the intended purpose of the proposed action, which was to satisfy the need for a reliable source of drinking water both now and in the future. We find this precedent relevant in the present context and conclude that appellant has not shown BLM failed to consider a reasonable range of alternatives.

Appellant further asserts that BLM violated NEPA by failing to adequately consider the cumulative impacts and indirect effects of action. Appellant notes that the Board in James Shaw, 130 IBLA 105 (1994), held

that "BLM must address the indirect effects, including reasonably foreseeable changes in land use * * * provided those effects are caused by its action." (SOR at 14.) Appellant seizes on the statement in the EA that the operation could impact visual quality, potentially degrading the

area's visual resources from Category III to Category IV. Conceding BLM has the discretion to allow such impacts when merited in the public interest, appellant asserts no finding has been made by BLM that this mineral materials sale is in the public interest. Appellant also argues that BLM failed to evaluate the cumulative impacts as necessary to take a "hard look" at the environmental consequences of the proposed action.

Acknowledging the potential impacts to visual quality, BLM asserts that the description of potential impacts in the EA, both direct and indirect, meet the requirements of NEPA. Regarding the public interest, BLM contends that Congress found that it was in the public interest to authorize the sale of mineral materials which were not locatable under the mining law or leasable under the Mineral Leasing Act, when it passed the Materials Act of 1947, 30 U.S.C. §§ 601-604 (2000). Further, BLM notes that its policy on Mineral Material Sales is stated in the regulations:

It is the policy of the [BLM] to permit the disposal of mineral material resources under the Bureau's jurisdiction at fair market value while assuring that adequate measures are taken to protect the environment and minimize damage to public health and safety during the authorized exploration for and the removal of such minerals.

43 CFR 3600.0-4.

In addition, BLM asserts that the proposed action meets objectives in the Dixie/St. George Resource Management Plan (RMP): "Consistent with the need to protect sensitive resources at risk from development, BLM's objectives for energy and mineral resources will be to: (a) continue to provide mineral materials needed for community and economic purposes through the designation and management of materials sites for individual and community use * * *." (RMP at page 2.7.) It is also contended by BLM that the United States would receive the benefit of an estimated \$75,000 paid annually to the U.S. Treasury as royalties from this site. (Answer at 8.)

Review of the BLM analysis of the direct and indirect impacts of the proposed action discloses a frank discussion of the impacts to air quality, range management, vegetation, soils, watershed and visual resources. (EA at 11-12.) With respect to impacts to visual resources, the EA found:

The existing foreground landscape * * * along Highway 91 would show relatively little change. The road will become more visible due to grading and widening, and a new fence would be constructed offsetting the existing fence. The vegetation and juniper trees would be left in place to the extent possible.

The mid-ground landscape, where the proposed action would occur, would be strongly changed as the mine develops. Initially, no quarry face would be visible from the [Key Observation Point], but in about six years (if development occurs as projected), the quarry will be visible above the ridgeline in the foreground. The quarry face would be bare, unweathered, red to reddish-purple rock, and will contrast strongly in color, form, and texture to the surrounding vegetated slopes. The top of the stockpile will be visible from the inception of mining, but as crushed rock is hauled from the site, the stockpile would become unnoticeable.

The background is a steep, light grey rocky face, and steeply dipping slopes covered with light vegetation and scattered dark green juniper trees. The proposed operation will not change the background.

* * * * *

The visual resources would probably be degraded to Category IV from Category III if the quarry is fully developed. Changes in the [Visual Resources Management] category may be authorized by the BLM (Decision VR-02 "BLM managers may use discretion in applying the standards to various land use proposals and grant exceptions where warranted by public interest or valid development rights, such as those conveyed under the mining or mineral leasing laws. Within excepted areas, BLM will apply appropriate mitigating measures to authorized actions to achieve the lowest feasible level of impact.")

(EA at 12.)

With respect to cumulative impacts of the project, the analysis in the EA was tiered to the Dixie Resource Area (St. George Field Office) Proposed RMP and Final EIS (September 1998). (EA at 15.) No additional cumulative impacts are expected to occur. Id. A discussion of the cumulative impacts of saleable mineral operations is contained in the EIS. (EIS at 3.61.)

A BLM decision to undertake an action analyzed in an EA based on a FONSI will ordinarily be affirmed when the record demonstrates that BLM has considered the relevant matters of environmental concern, taken a "hard look" at potential environmental impacts, and made a convincing case that no significant impact will result therefrom or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. Emerald Trail Riders Association, 152 IBLA 210, 214 (2000); Defenders of Wildlife, 152 IBLA at 6; Rebecca S. Andersen, 145 IBLA 206, 218 (1998). Based on the analysis of the environmental impacts of the proposed action set forth in the EA, BLM reached its FONSI. (FONSI/DR at 1.) An appellant seeking to overcome that decision must carry the burden of demonstrating, with objective proof, that BLM failed to adequately

consider a substantial environmental question of material significance to the proposed action. *Emerald Trail Riders Association*, *supra*, at 214. We find that appellant has failed to do so here.

The practice of tiering an EA and its analysis of specific impacts of a proposed action which is part of a larger plan of action to a programmatic EIS analysis of the broader cumulative impacts of the program has been held to be appropriate. *Ventling v. Bergland*, 479 F. Supp. 174, 180 (D.S.D), *aff'd*, *mem.*, 615 F.2d 1365 (8th Cir. 1979); *see Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1323 n.29 (8th Cir. 1974); *Blue Mountains Biodiversity Project*, 139 IBLA 258, 266 (1997); *Southern Utah Wilderness Association*, 124 IBLA 162, 169 (1992). As noted above, this was done by BLM in this case. In the context of a challenge to a FONSI based on an EA which is tiered to an EIS, the issue before the Board is whether the EA demonstrates that BLM has taken a hard look at the proposed action, identified relevant areas of environmental concern, and shown that any environmental impacts of the proposed action not previously analyzed in the EIS are insignificant. *Blue Mountains Biodiversity Project*, *supra*, at 266; *Southern Utah Wilderness Alliance*, 124 IBLA at 169. Appellant has not carried the burden of showing that there are significant impacts which were not addressed in the EIS to which the EA is tiered. *Southern Utah Wilderness Alliance*, 127 IBLA 282, 289 (1993).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant Jr.
Administrative Judge

I concur:

T. Britt Price
Administrative Judge